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No.

In the

Supreme Court of the United States

October Term, 1998

LINDA DARLENE LANGFORD,

Petitioner,

v

MAKITA CORPORATION OF AMERICA;
MAKITA U.S.A., INC., AND
MAKITA CORPORATION

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER'S FUNDAMENTAL RIGHTS TO FAIR, IMPARTIAL AND EQUAL JUSTICE WERE DENIED BY THE FAILURE OF BOTH THE COURT OF APPEALS AND THE DISTRICT COURT TO FOLLOW THE *ERIE* DOCTRINE IN FAILING TO APPLY AND FOLLOW STATE LAW BY GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER AND WHETHER, BY FAILING TO FOLLOW THE *ERIE* DOCTRINE, THE COURT OF APPEALS AND THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

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OPINIONS BELOW

The Magistrate for the United States District Court for the Northern District of Mississippi (Eastern Division) rendered the Memorandum Opinion, September 2, 1998, and is set forth in the Appendix, p. 3. The Magistrate's Final Judgment is also dated September 2, 1998, and is set forth in the Appendix, p. 8 These are unreported.

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1, and is reported at 181 F.3d 96. A timely petition for rehearing was filed and was denied on June 16, 1999. The order denying the petition for rehearing is set forth in the Appendix, p. 9.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C.A. Section 1254. The United States Court of Appeals for the Fifth Circuit issued its denial for Langford's petition for rehearing on June 16, 1999. This Petition was timely filed within 90 days of the panel rehearing denial, and thus is timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Miss. Code Ann. § 11-1-63 (1993). Product liability actions; conditions for liability; what constitutes defective product.

In any action for damages caused by a product except for commercial damage to the product itself:

(a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) 1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary

knowledge common to the community.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug,medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance

of the dangerous condition.

(e) In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)3 of this section, the manufacturer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; and

(ii) The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible designalternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

(g)(i) The manufacturer of a product who is found liable for a defective product pursuant to subsection (a) shall indemnify a product seller for the costs of litigation, any

reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(ii) Subparagraph (i) shall not apply unless the seller has given prompt notice of the suit to the manufacturer within thirty (30) days of the filing of the complaint against the seller.

(h) Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.

STATEMENT OF THE CASE

The statutory provision for the jurisdiction of the United States DistrictCourt for the Northern District of Mississippi (Eastern Division) is 28 U.S.C.A. Section 1332, based upon the complete diversity of citizenship of the parties, with the amount in controversy being in excess of $75,000.00.

This Court should grant *certiorari* review because the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the United States District Court for the Northern District of Mississippi, as to call for an exercise of this Court's supervisory power. When the district courts of the United States fail to apply the appropriate legal standards, and when such failure is sanctioned by the appellate courts of the United States, the fundamental rights of individuals to fair, impartial and equal justice are denied.

The Petitioner, Linda Darlene Langford, was seriously injured at her place of employment, Belmont Homes, Inc., in Belmont, Mississippi, on February 10, 1995, while using a Model LS1020 miter saw manufactured by the Respondents (hereinafter also referred to as "Makita"). Langford filed suit against the Respondents in the United States District Court for the Northern District of Mississippi (Eastern Division) on May 5, 1997. Jurisdiction was based upon complete diversity of citizenship pursuant to 28 U.S.C.A. Section 1332, with the amount in controversy being in excess of $75,000.00. Venuewas proper in the United States District Court for the Northern District of Mississippi (Eastern Division) pursuant to 28 U.S.C.A. Section 1319(c).

An amended complaint was filed on July 22, 1997. The Magistrate entered an order on February 24, 1998, granting Langford leave to file a second amended complaint, and a second amended complaint was filed by Langford.

Respondents filed a Motion for Summary Judgment on August 17, 1998. The Magistrate for the United States District Court for the Northern District of Mississippi

(Eastern Division) rendered the Memorandum Opinion on September 2, 1998, granting summary judgment in favor of the Respondent. The Magistrate's Final Judgment was entered on September 2, 1998, dismissing Langford's complaint, with prejudice.

The Magistrate's Final Judgment was appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed, per curiam, on May 13, 1999. *Langford v. Makita*, 181 F.3d 96 (5th Cir. 1999). Langford's petition for rehearing was denied by the panel on June 16, 1999.

The Makita Model LS1020 miter saw which caused Langford's injury was manufactured in 1990 and was purchased by Langford's employer in the fall of 1994 from a Makita distributor. There is no dispute that the blade guard on the saw was missing, either having broken off during use or having beenintentionally removed by Langford's employer to increase the speed at which the employees could work. Langford, who worked to support her family, had never previously worked around power saws and did not fully appreciate or understand the danger of using a miter saw without the blade guard in place. Even if Langford had fully appreciated or understood the danger of using a miter saw without the blade guard in place, her refusal to use the saw would have caused her to lose her job.

On the day of her injury, Langford was cutting plastic molding. As she released the trigger on the Makita saw, the spinning saw blade caught the material Langford was holding in her left hand and pulled her hand and forearm into the blade. Langford's left hand and arm were seriously and permanently injured. Langford's left wrist was cut so severely that, without being supported, the hand would have

dangled. Langford has undergone four major surgeries and the injury has left her permanently and totally disabled.

Langford brought suit against Makita under Mississippi's products liability statute, Section 11-1-63 of the Mississippi Code of 1972, Annotated, as amended, alleging, *inter alia*, negligent design. The basis for Langford's charge of negligent design was that the Model LS1020 Makita miter saw would operate without the blade guard being in place. Langford produced evidence indicatingMakita knew or should have known that serious injury could occur if this saw was operated without the blade guard. Langford also produced evidence indicating that Makita knew or should have known that users such as Belmont Homes, Inc., and other similarly situated manufacturers, would use miter saws without blade guards for many reasons, including increased speed of production.

Langford charged that Makita's Model LS1020 miter saw could have, and should have been, designed with an interlock which would render the saw incapable of operating if the blade guard was missing. Makita's corporate representative testified in a deposition that the Model LS1020 miter saw was introduced as a product in 1987 and that Makita understood that it was "highly possible" that the blade guard could be removed, yet Makita did not incorporate an interlock into the design of the saw which would render the saw incapable of operating if the blade guard was missing. Langford produced evidence that an electrical interlock device was patented in the United States in 1975 and that the cost of the electrical interlock device was approximately $5.05. Langford also produced evidence that a mechanical interlock device for a saw was patented in the United States in 1986 and that the cost of incorporating the mechanical

interlock device on the Model LS1020 miter saw was negligible. Langford produced expert testimony that her injuries would not have occurred if theModel LS1020 miter saw which destroyed her hand had had either a mechanical interlock or an electrical interlock which would have rendered the saw inoperable if the blade guard was missing.

The Magistrate, on September 2, 1998, granted Makita's summary judgment motion because the Magistrate found that the saw had been substantially altered after it left Makita's control, that this substantial alteration was the cause of Langford's injuries and that Langford was aware of the danger the altered saw presented but continued to use the saw. The basis of the Magistrate's finding that the saw had been substantially altered was the fact that the blade guard was missing. The final judgment dismissing Langford's complaint, with prejudice, was entered on September 2, 1998.

Langford appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed Magistrate's action in a per curiam opinion filed on May 13, 1999. The Fifth Circuit held that all of Langford's claims are governed by Section 11-1-63 of the Mississippi Code of 1972, Annotated, as amended, and that, under that statute, a manufacturer has no liability unless the plaintiff proves that the product was defective when it left the manufacturer's control. The Fifth Circuit went on to state that, under Section 11-1-63, a manufacturer is not liable if the plaintiff knew of the defective condition and voluntarily continued to usethe product. The Fifth Circuit ruled: "[W]e conclude that the district court correctly determined that no reasonable juror could have reached any conclusion except that the saw was substantially altered and that Langford voluntarily assumed the risk of using it in a defective condition."

Langford filed a petition for rehearing which was denied by the Fifth Circuit on June 16, 1999.

The Petitioner has filed a Petition for Writ of Certiorari based upon the issues and argument presented herein.

ARGUMENT

WHETHER THE PETITIONER'S FUNDAMENTAL RIGHTS TO FAIR, IMPARTIAL AND EQUAL JUSTICE WERE DENIED BY THE FAILURE OF BOTH THE COURT OF APPEALS AND THE DISTRICT COURT TO FOLLOW THE *ERIE* DOCTRINE IN FAILING TO APPLY AND FOLLOW STATE LAW BY GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER AND WHETHER, BY FAILING TO FOLLOW THE *ERIE* DOCTRINE, THE COURT OF APPEALS AND THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The United States District Courts are required to follow the law of thestate as declared by its highest court in cases where jurisdiction of the federal court is based exclusively on diversity of citizenship. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1937).

Langford properly brought claims of negligent design against Makita. Negligent design has long been recognized as a cause of action under Mississippi common law. *State Stove Manufacturing Company v. Hodges*, 189 So.2d 113

(Miss.1966); *Alley v. Praschak Machine Company*, 366 So.2d 661 (Miss. 1979); *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So.2d 248 (Miss. 1993). A cause of action for negligent design is also incorporated into Mississippi's products liability statute. Miss. Code Ann. §11-1-63 (Supp. 1998).

Under Mississippi's statutory enactment, Langford was required to prove by a preponderance of the evidence that at the time the Makita Model LS1020 miter saw left the control of the manufacturer it was designed in a defective manner. Miss. Code Ann. §11-1-63(a)(i)(3) (Supp. 1998). Langford also had the burden of showing, by a preponderance of the evidence, that at the time the Model LS1020 miter saw left the control of Makita that the manufacturer knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage, and that thereexisted a feasible design alternative that would have, to a reasonable probability, prevented the harm. Miss. Code Ann. §11-1-63(f) (Supp. 1998).

As succinctly stated in the per curiam opinion of the Fifth Circuit:

> The district court granted Makita's motion for summary judgment because: (1) the saw had been substantially altered after it had left Makita's control, and this substantial alteration was the cause of Langford's injuries; and (2) Langford was aware of the danger of the altered saw presented and nevertheless continued to use it.

However, under Mississippi law neither of these two stated reasons for allowing summary judgment is proper.

Under Mississippi law, the fact that a product has been substantially altered is not a complete defense to a claim of negligent design:

> If the plaintiff can establish negligence of design, directions or warnings, he not only has established fault despite the fact that the product may be operating satisfactorily and smoothly after the accident, but also that the defect existed when the product left the manufacturer's plant, regardless of undue wear or mishandling thereafter.

Ward v. Hobart Manufacturing Company, 317 F.Supp. 841, 847-848 (S.D. Miss., 1970).

Langford's claim against Makita is that Makita knew or, in the light of reasonably available knowledge or in the exercise of reasonable care, shouldhave known that the blade guard would or could be removed from the Model LS1020 miter saw and that there existed a reasonable design alternative which would have, to a reasonable probability, prevented Langford's injury. The reasonable design alternative claimed by Langford is the incorporation of either a mechanical or an electrical interlock device which would render the saw inoperable without the blade guard being in place. For the Magistrate to rule that because the blade guard was missing Makita can have no liability turns Langford's claim for negligent design completely inside out. Langford's claim is that removal or breakage of the blade guard was reasonably foreseeable and that, therefore, it was negligent

design not to incorporate an interlock device which would have rendered the saw inoperable in the absence of the blade guard. Langford supported her claim with proof that such interlock devices exist, are inexpensive and do not impair the utility, usefulness, practicality or desirability of the miter saw. Langford also presented proof that, had such a device been incorporated into the design of the saw, she would not have been injured.

Thus, under Mississippi law, a question of fact was presented for determination by the jury and summary judgment was improper.

Additionally, the Magistrate concluded "there is no genuine issue ofmaterial fact that the aw had been substantially altered by the guard being removed or broken off . . .." Under Mississippi law, if there is substantial evidence that the deformity (which, in this case, was the missing blade guard) is due to wear and tear, a jury question is presented. *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So. 2d 248, 262 (1993). Langford produced substantial evidence that the missing blade guard was due to wear and tear. Mississippi law provides that if the injured party produces expert testimony to the effect that a properly designed product would not have caused the injury, even with lack of proper maintenance, then the evidence is sufficient to send the question to the jury. *Mozingo v. Correct Manufacturing Corporation*, 752 F. 2d 168, 177-178 (5th Cir. Miss., 1985).

The Magistrate's second basis for granting summary judgment, that the "plaintiff assumed the risk," is also improper under Mississippi law. Mississippi law follows the doctrine of comparative negligence. Miss. Code Ann.

§11-7-15 (1972); *Horton v. America Tobacco Co.*, 667 So.2d 1289 (Miss. 1995). The defense of assumption of risk, rather than being an absolute bar to recovery by the plaintiff, has been held by the Mississippi Supreme Court to have been "subsumed in our comparative negligence doctrine." *Horton*, 667 So.2d at 1293. Summary judgment cannot, under Mississippi law, be founded uponassumption of risk since apportionment of negligence between the plaintiff and the defendant is the exclusive province of the jury:

> [A]ssumption of the risk on the part of the plaintiff merely goes to the percentage of fault attributable to the plaintiff; it no longer affords a complete defense to the defendant unless the jury finds that the plaintiff's assumption of risk proportionately reduces damages to zero.

Donald v. Triple S Well Service, Inc., 708 So.2d 1318, 1325 (Miss. 1998). This position was recently reinforced by the Mississippi Supreme Court:

> We take this opportunity to hold once again that the assumption of risk doctrine is subsumed into comparative negligence. Any actions which might constitute an assumption of risk should be dealt with only in the context of the comparative negligence doctrine. A jury is always free to decide that an act which constitutes an assumption of risk was the sole proximate cause of a plaintiff's injuries. We see no reason why acts which might constitute an assumption of risk should, as a matter of law, create a complete bar to recovery. The

> comparative negligence doctrine gives juries great flexibility in reaching a verdict. Any fault on the part of the plaintiff should be considered only in the context of comparative negligence.

Churchill v. Pearl River Basin Development District, ____ So.2d ____, No. 96-CA-01384-SCT (¶12) (Miss. 1999).

Thus, under Mississippi law, summary judgment cannot be granted upon the basis of assumption of risk because assumption of risk is a jury question.

Additionally, the Mississippi Supreme Court has declared that the defenseof assumption of risk is not available to a defendant "unless the defendant admits the existence of a risk." *Wilks v. American Tobacco Company*, 680 So.2d 839, 843 (Miss. 1996). Therefore, Makita cannot use assumption of risk as a defense without first admitting that, in using the saw, Langford was exposed to a danger. Makita did not admit that the Model LS1020 saw was negligently designed and cannot, therefore, assert assumption of risk. The Magistrate's grant of summary judgment based upon assumption of risk was clearly contrary to established and well-settled Mississippi. If, in order to make the defense of assumption of risk available to it, Makita admits that there was a danger of injury to Langford in using the Model LS1020 without a blade guard in place, it then becomes a jury question whether Makita's failure to incorporate an interlock device, which would render the saw inoperable in the absence of the blade guard, was negligent design. Again, because this is a jury question, summary judgment was improper under Mississippi law.

Federal courts in Mississippi have recognized that, in diversity cases, they are "*Erie* bound" to follow the substantive law of Mississippi. *Mozingo v. Correct Manufacturing Corporation*, 752 F.2d 168, 173 (5th Cir. 1985).

The Mississippi Supreme Court has declared that it is its sole province to decide matters of state law. *Sperry-New Holland, a Div. of Sperry Corp. v.Prestage*, 617 So. 2d 248, 256 (1993).

The Fifth Circuit has recognized the right of the Mississippi Supreme Court to determine, in a products liability case, that misuse is a jury question. *Edwards v. Sears, Roebuck and Company*, 512 F.2d 276, 289 (5th Cir. Miss. 1975). The Fifth Circuit has held that, in a product liability action in Mississippi, if an employer (such as Belmont Homes in this case) negligently maintains or omits to maintain the product, the conduct of the employer is not the sole proximate cause as a matter of law. *Lenoir v. C. O. Porter Machinery Company*, 672 F.2d 1240, 1244-1245 (5th Cir. Miss. 1982). The rulings of both the district court and the court of appeals ignored established and well-settled Mississippi law, which, under the *Erie* doctrine, they were duty bound to follow and apply. If either the court of appeals or the district court had any questions about the law of Mississippi to be applied in this case, such questions should have been resolved by certifying them to the Mississippi Supreme Court. *Lehman Brothers v. Schein*, 416 U.S. 386, 94 S. Ct. 1741 (1974).

Langford, a working mother who was permanently and totally disabled, saw her complaint dismissed, with prejudice, by the United States District Court of the Northern

District of Mississippi. This action was affirmed by the United States Court of Appeals for the Fifth Circuit. The rulings of both the districtcourt and the court of appeals ignored established and well-settled Mississippi law, which, under the *Erie* doctrine, they were duty bound to follow and apply. This failure denied fair, impartial and equal justice to Langford. This Court cannot allow, condone or permit the rights of innocent victims such as Langford to be trampled by the district courts or the courts of appeals, which seem more interested in docket management than in seeing that justice is done. This action by both the court of appeals and the district court is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Therefore, this Court should grant this Petition.

CONCLUSION

The United State District Court for the Northern District of Mississippi (Eastern Division) ignored and failed to follow and apply established and well-settled Mississippi law and granted summary judgment, dismissing, with prejudice, the Petitioner's products liability cause of action. The district court, by ignoring and failing to follow and apply Mississippi law, violated the *Erie* doctrine in this diversity of citizenship case. The Petitioner was a working mother who was permanently and totally disabled by a Makita saw the Petitioner claims was negligently designed. The Petitioner's fundamental rightsto fair, impartial and equal justice were violated by the district court's action in granting summary judgment in favor of Makita when Petitioner's proof clearly made out a jury question under established and well-settled Mississippi law.

The United States Court of Appeals for the Fifth Circuit also ignored and failed to follow and apply established and well-settled Mississippi law by affirming the action of the district court. This was a second violation of the *Erie* doctrine and was a further violation of the Petitioner's fundamental rights to fair, impartial and equal justice.

This Court should grant *certiorari* review because the actions of both the court of appeals and the district court are such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. It is incumbent upon this Court to protect the fundamental rights to fair, impartial and equal justice of the Petitioner, and other similarly situated citizens are wrongfully denied their day in court, then support for our system of justice is further eroded. Legal rhetoric should not be exercised to sidestep critical issues of society; otherwise, no one will believe that the system is just.

Respectfully submitted,

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98-60764

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Langford

v.

Makita Corporation

May 13, 1999, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION: Affirmed.

CIVIL ACTION NO. 1:97CV139-JAD

LINDA DARLENE LANGFORD,
PLAINTIFF

VS.

MAKITA U.S.A., INC., AND MAKITA CORPORATION
DEFENDANTS

GEORGIA CASUALTY & SURETY COMPANY,
INTERVENOR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

September 2, 1998, Decided

September 2, 1998, Filed

COUNSEL:

For LINDA DARLENE LANGFORD, plaintiff: John Booth Farese, FARESE, FARESE & FARESE, Ashland, MS. Gene Hamby, Jr., GENE HAMBY, JR., ATTORNEY, Sheffield, AL.

For GEORGIA CASUALTY & SURETY COMPANY, intervenor-plaintiff: Timothy Reese Balducci, WEBB, SANDERS, DEATON, BALDUCCI, & SMITH, Oxford, MS. Dennis W. Voge, MITCHELL, VOGE, BEASLEY & CORBAN, Tupelo, MS.

For MAKITA USA, INC., defendant: David L. Ayers, WATKINS & EAGER, Jackson, MS.

For MAKITA CORPORATION, defendant: Mark D. Jicka, WATKINS & EAGER, Jackson, MS.

JUDGES:
JERRY A. DAVIS, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
JERRY A. DAVIS

OPINION:

MEMORANDUM OPINION

The defendants have filed motions for summary judgment in this products liability case asserting that the subject miter saw was not in substantially the same condition as when it left the custody and control of the defendants and that plaintiff assumed the risk. Having considered the submissions of the parties, the court finds the motion should be granted.

FACTUAL BACKGROUND

Plaintiff Langford was seriously injured at her place of employment, Belmont Homes, on February 10, 1995, while using a miter saw, Model LS1020, manufactured by the defendants in December, 1990. Several days before the accident Ms. Langford had noticed that the guard was missing from the saw, either broken off or removed. When she advised her supervisor of this fact and that someone may get hurt, she was told that maintenance had been notified. Fearful of losing

her job if she didn't continue to work, plaintiff continued to use the saw without the guard until her injury. The safety trigger on the subject saw had also been taped in a depressed condition so that it continued to run as long as power was supplied.

There is no question that the saw left the control of the defendant with a clear plastic guard in place, with warnings in the instructions manual and on a label of the saw itself not to operate the saw without the guard in place, and with a safety trigger that must be depressed for the saw to start. The warning label remained on the saw involved in plaintiff's accident. The model saw involved in this accident had warnings in 1987 and 1988 that it was for residential use only. In 1990 there was no restriction for residential use only. Plaintiff submits that defendant knew that the saw was being used in an industrial setting and that guards were being removed to speed up the operation of the saw. It is plaintiff's contention that it was foreseeable for defendant to know that the guards were being removed and that the saw should have been equipped with an interlock that would have prevented the saw from operating if the guard was removed. Such interlock technology has been in existence for many years.

Plaintiff's testimony reflects that she was aware of the danger of operating the saw without the guard but she feared losing her job if she refused. Both plaintiff's and defendants' experts agree that the accident would not have occurred if the guard had been in place as manufactured.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).* Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).* "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).* The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. *Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1994).*

LEGAL DISCUSSION

In Mississippi the law is clear that a product be in substantially the same condition at the time of a plaintiff's injury as the product was when it left the custody and control of the defendant. *State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971).* This case law has also been endorsed by the Mississippi legislature in products liability legislation enacted in 1993 requiring that the product be in the same condition as it was when it left the control of the manufacturer or seller before finding liability. Miss. Code Ann. § 11-1-63 (Supp. 1997). Accordingly, the Court must focus on whether the miter saw was defective and unreasonably dangerous when it

left the control of defendants and whether plaintiff's injuries were proximately caused by the defective condition. In the instant case the facts show that the saw was not in the same condition as it was when it left Makita. The safety trigger had been taped in the depressed condition and the plastic guard was missing. Both of these safety features had either been bypassed by plaintiff's employer or the guard had not been timely repaired.

Plaintiff argues that the saw in this case was not intended for industrial use and that technology was in place that would allow for the saw to be disabled if the guard was removed. First, a manufacturer is not an insurer against accidental injury from the use of its product. *Ward, supra at 1187.* Second, the facts before the court are unchallenged that the injury would not have occurred if the guard had been on the saw as it was when it left the hands of the defendants. If the product has been substantially modified or altered by a third party and the manufacturer has played no part in the modification, the manufacturer cannot be held liable if the modification caused the injury. *Creel v. General Motors, 233 So. 2d 105, 109 (Miss. 1970).* While it may be technologically possible to place an interlock system on a saw, plaintiff has no proof that she would have been hurt absent the modification by her employer. In fact, the proof is to the contrary.

Moreover, the court finds that plaintiff knew of the danger of using the saw without the guard, advised her supervisor that someone could get hurt, and, yet, continued to use the saw. Assumption of the risk in this context is recognized by the law of Mississippi and acts as a bar to any recovery by plaintiff against the defendants. Miss. Code Ann. § 11-1-63(d)(Supp. 1997); see also, *Materials Transportation Co. v. Newman, 656 So. 2d 1199, 1203, n. 1 (Miss. 1995).*

Plaintiff may not avoid the assumption of risk defense by using the fear of termination from her employment. *Hedgepeth v. Fruehauf Corp., 634 F. Supp. 93 (S.D. Miss. 1986),* aff'd *813 F.2d 405 (5th Cir. 1987).*

CONCLUSION

Plaintiff in this case suffered a serious injury at her workplace using defendants' saw. However, there is no genuine issue of material fact that the saw had been substantially altered by the guard being removed or broken off and the safety trigger taped in a depressed condition. Plaintiff's accident would not have occurred absent these modifications to the saw's safety features. Also, plaintiff was aware of the dangerous condition of the guard being absent, talked to her supervisor about the guard, and continued to work with the saw. There is no issue of material fact that plaintiff assumed the risk. Therefore, defendants' motions for summary judgment are granted. A separate judgment will be entered

This 2nd day of September, 1998.

JERRY A. DAVIS
UNITED STATES MAGISTRATE JUDGE

CIVIL ACTION NO. 1:97CV139-JAD

LINDA DARLENE LANGFORD,
PLAINTIFF

VS.

MAKITA U.S.A., INC., AND MAKITA CORPORATION
DEFENDANTS

GEORGIA CASUALTY & SURETY COMPANY,
INTERVENOR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

September 2, 1998

FINAL JUDGMENT

In accordance with the memorandum opinion issued this day, defendants' motion to dismiss be and hereby is granted and this cause is hereby dismissed with prejudice.

IT IS SO ORDERED

U.S. COURT OF APPEALS
FILED
JUN 16 1999
CHARLES R. FULBRUGE III
CLERK

98-60764

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LINDA DARLENE LANGFORD,
PLAINTIFF - APPELLANT

VS.

MAKITA CORPORATION OF AMERICA; ET AL
DEFENDANTS

MAKITA U.S.A., INC., AND MAKITA CORPORATION
DEFENDANTS -APPELLEES

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.
PER CURIAM

IT IS ORDERED that the petition for rehearing filed in the above case is *denied*.

s/United States Circuit Judge